

2006
CIRCUIT COURTS OF APPEALS
CASE BRIEFS

By Circuit

Click **CIRCUIT** for cases

1st CIRCUIT

2nd CIRCUIT

3rd CIRCUIT

4th CIRCUIT

5th CIRCUIT

6th CIRCUIT

7th CIRCUIT

8th CIRCUIT

9th CIRCUIT

10th CIRCUIT

11th CIRCUIT

DC CIRCUIT

1st CIRCUIT

U.S. v. Coker, 433 F.3d 39, December 28, 2005

Click **[HERE](#)** for the court's opinion.

For Sixth Amendment right to counsel purposes, a federal charge is a different “offense” from a state charge, even when they both deal with the same underlying conduct and have essentially the same elements. Federal agents can interview and take a statement from the suspect without notification to and the presence of the attorney representing the suspect on the state charge.

The **2nd Circuit** disagrees – *U.S. v. Mills*, 412 F.3d 325 (2005).

The **5th Circuit** agrees – *U.S. v. Avants*, 278 F.3d 510 (2002).

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U.S. v. Samboy, 433 F.3d 154, December 29, 2005

Click **[HERE](#)** for the court's opinion.

There is no legal rule requiring police to seek a warrant as soon as probable cause likely exists. An exigency may exist even when police might have foreseen the circumstances. An exigency may be negated when the government unreasonably and deliberately delays or avoids obtaining a warrant.

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McConkie v. Nichols, 446 F.3d 258, May 15, 2006

Click [HERE](#) for the court's opinion.

Abuse of power violates the Fifth Amendment Due Process Clause when it is so extreme and egregious as to "shock the conscience." The conduct must be truly outrageous, uncivilized, and intolerable; it must be stunning, evidencing more than humdrum legal error. Telling someone that his statement would remain confidential and thereby knowingly misrepresenting the nature of his Fifth Amendment right against self-incrimination is not so egregious that it shocks the conscience.

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U.S. v. Cotto, 456 F.3d 25, August 2, 2006

Click [HERE](#) for the court's opinion.

Bartering drugs for firearms constitutes "use" of the firearms under 18 U.S.C. § 924(c)(1)(A).

The 3rd, 4th, 5th, 8th, and 9th Circuits agree. (cites omitted).

The 6th, 7th, 11th, and D.C. Circuits disagree. (cites omitted)

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U.S. v. Allen, 469 F.3d 11, November 17, 2006

Click [HERE](#) for the court's opinion.

Where the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched incident to the arrest of an occupant. This bright-line rule extends to SUVs.

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U.S. v. Pelletier, 469 F.3d 194, November 28, 2006

Click [HERE](#) for the court's opinion.

The Supreme Court's decision in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) [Hudson at QR-7-3](#) that a violation of the "knock and announce" rule in the course of executing a search warrant does not automatically trigger the Exclusionary Rule applies as well in the context of an arrest warrant.

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2nd CIRCUIT

MacWade v. Kelly, 460 F.3d 260, August 11, 2006

Click [HERE](#) for the court's opinion.

New York City's program of random, suspicionless subway baggage searches is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a "special need"; (2) that need is weighty; (3) the program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree.

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U.S. v. Ness, 466 F.3d 79, October 10, 2006

Click [HERE](#) for the court's opinion.

"Transaction money laundering" and "transportation money laundering," in violation of 18 U.S.C. §§1956(a)(1)(B)(i) and 1956(a)(2)(B)(i), both proscribe conduct "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." (italics added). Highly complex and surreptitious processes through which the funds are transferred — involving coded language, the use of intermediaries, secretive handoffs, and cash transactions — suffice to permit the inference that the deliveries have been designed in a way that would conceal the source of the moneys.

The 5th and 10th Circuits disagree, holding that the concealment element is satisfied only when the transaction or transportation at issue is designed to give unlawful proceeds the appearance of legitimate wealth. (cites omitted).

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U.S. v. Skinner, 2006 U.S. App. LEXIS 29607, November 30, 2006

Violations of 18 U.S.C. §§ 242 and 241 are crimes of violence for purposes of 18 U.S.C. § 924(c).

Click [HERE](#) for the court's opinion.

See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) [Leocal at QR-6-2](#)

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Cassidy v. Chertoff, 2006 U.S. App. LEXIS 29388, November 29, 2006

Click [HERE](#) for the court's opinion.

It is a "governmental search" for purposes of the Fourth Amendment when employees of a private

transportation company search the carry-on baggage of randomly selected passengers and inspect randomly selected vehicles, including their trunks, pursuant to the company's security policy implemented in order to satisfy the requirements imposed by the Maritime Transportation Security Act of 2002 and its implementing regulations.

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3rd CIRCUIT

U.S. v. Kiam, 432 F.3d 524, January 3, 2006

Click [HERE](#) for the court's opinion.

A person seeking entry into the United States does *not* have a right to remain silent regarding matters concerning admissibility. An alien at the border must convince a border inspector of his or her admissibility to the country by affirmative evidence. While an alien is unquestionably in "custody" until he is admitted to the country, persons seeking entry at the border may be questioned about admissibility without *Miranda* warnings.

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U.S. v. Hull, 456 F.3d 133, July 28, 2006

Click [HERE](#) for the court's opinion.

Looking at this issue for the first time, the Court decides:

Mere "possession" of a pipe bomb does not qualify as a "Federal crime of violence" under 18 U.S.C. § 842(p)(2)(A). Since § 842(p) does not define "Federal crime of violence," refer to 18 U.S.C. § 16 for its definition. Under § 16(a), "use" requires the "active employment" of force, and therefore a degree of intent higher than negligence. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Simply "possessing" a pipe bomb is not an "offense that naturally involves a person acting in disregard of the risk that physical force might be used against another in committing the offense."

See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004). [Leocal at QR-6-2](#)

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U.S. v. Mosley, 454 F.3d 249, July 21, 2006

Click [HERE](#) for the court's opinion.

Looking at this issue for the first time, the Court decides:

A traffic stop is a seizure of everyone in the stopped vehicle. Thus passengers in an illegally stopped

vehicle have “standing” to object to the stop, and may seek to suppress the evidentiary fruits of that illegal seizure under the “fruit of the poisonous tree doctrine.” When a vehicle is illegally stopped, no evidence found during the stop may be used against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged (attenuation, independent source, inevitable discovery).

The 1st, 5th, 7th, 8th, 9th, and 11th Circuits agree (cites omitted).

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U.S. v. Delfin-Colina, 464 F.3d 392, September 22, 2006

Click [HERE](#) for the court’s opinion.

Looking at this issue for the first time, the Court decides:

The *Terry* reasonable suspicion standard applies to routine traffic stops despite language in *Whren v. U.S.*, 517 U.S. 806 (1996), that suggests that the decision to stop an automobile is reasonable only where the police have probable cause to believe that a traffic violation has occurred. A traffic stop will be deemed a reasonable “seizure” when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop.

The 2nd, 6th, 8th, 9th, 10th, and 11th Circuits agree (cites omitted).

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U.S. v. Jones, 471 F.3d 478, December 28, 2006

Click [HERE](#) for the court’s opinion.

Health care fraud in violation of 18 U.S.C. § 1347(2), requires misrepresentation by the defendant in connection with the delivery of, or payment for, health care benefits, items, or services.

An employee’s theft of money already paid by patients is not “in connection with the delivery of or payment for health care benefits.”

Fraud is different from theft. Theft is the taking of another’s property by trespass with intent to deprive permanently the owner of the property. Fraud means to cheat or wrongfully deprive another of his property by deception or artifice. An employee’s implicit promise not to steal from the employer cannot be the basis for a fraud.

Instead, see 18 U.S.C. § 669, theft or embezzlement in connection with healthcare.

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4th CIRCUIT

U.S. v. Rizzi, 434 F.3d 669, January 9, 2006

Click [HERE](#) for the court's opinion.

Search warrants for controlled substances are governed exclusively by 21 U.S.C. § 879, and may be executed at any time of day or night without any showing or finding by the judge that a nighttime execution is necessary.

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U.S. v. Moya, 454 F.3d 390, July 24, 2006

Click [HERE](#) for the court's opinion.

“Constructive possession” means that the defendant exercised, or had the power to exercise, dominion and control over the item. The possession can be shared with others. Mere presence at the location where contraband is found is insufficient to establish possession. There must be some action, some word, or some conduct that links the individual to the items, shows some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander.

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U.S. v. Hurwitz, 459 F.3d 463, August 22, 2006

Click [HERE](#) for the court's opinion.

A supporting affidavit or document may be read together with (and considered part of) a search warrant that otherwise lacks sufficient particularity. It is sufficient either for the warrant to incorporate the supporting document by reference or for the supporting document to be attached to the warrant itself.

The 6th Circuit agrees (cite omitted).

The 1st, 3rd, 8th, 9th, 10th, and D.C. Circuits require that the warrant both reference the document and that the document accompany the warrant (cites omitted).

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U.S. v. Jones, 471 F.3d 535, December 22, 2006

Click [HERE](#) for the court's opinion.

Although the victim's minor status is a fact which the prosecution must prove, defendant's knowledge of the victim's minority is not an element of the offense of 18 U.S.C. § 2423(a), transportation of minors for illegal sexual activity.

All four circuits that have addressed this issue, the 2nd, 3rd, 9th, and 10th Circuits, agree. (cites omitted).

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5th CIRCUIT

U.S. v. Pope, 452 F.3d 338, June 6, 2006 **[See Reversal and Vacation Below](#)**

Click **[HERE](#)** for the court's opinion.

An officer's subjective motive to search does matter. When applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search.

See also *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006) **[Brigham City at QR-7-3](#)**

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U.S. v. Pope, 467 F.3d 912, October 17, 2006

Click **[HERE](#)** for the court's opinion.

This opinion vacates and reverses the opinion first reported in QR-7-4 and briefed above.

In the earlier decision, the court refused to apply the "good faith" exception, holding that an officer's subjective motive to search does matter, and that when applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search. The court now holds that even though the facts in the affidavit supporting the warrant were stale, good faith reliance on the issued warrant makes the evidence admissible.

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U.S. v. Alvarez, 451 F.3d 320, June 1, 2006

Click **[HERE](#)** for the court's opinion.

For purposes of 21 U.S.C. § 860(e)(1), Distribution of Controlled Substances Within 1000 Feet of a Playground, the government must prove that the controlled substance offense took place within 1000 feet of an outdoor facility intended for recreation that is open to the public and that includes three or more separate apparatus intended for the recreation of children.

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U.S. v. Brathwaite, 458 F.3d 376, July 31, 2006

Click [HERE](#) for the court's opinion.

Looking at this issue for the first time, the Court decides:

When a person invites a confidential informant into his home, he forfeits his privacy interest in those activities that are exposed to the informant. Video recording what transpires in the informant's presence inside the home does not violate the Fourth Amendment or Title III.

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U.S. v. Barrera, 464 F.3d 496, September 5, 2006

Click [HERE](#) for the court's opinion.

An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is "reason to believe" the suspect is within. "Reasonable belief" embodies the same standards of reasonableness as probable cause but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances. Like "reasonable suspicion" or "probable cause," "reasonable belief" is not a finely-tuned standard. The terms are commonsense, non-technical concepts that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. "Reasonable belief" can only be ascertained through a weighing of the facts.

See *U.S. v. Pruitt*, 6th Circuit (below).

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U.S. v. Newman, 472 F.3d 233, December 5, 2006

Click [HERE](#) for the court's opinion.

Officers may not impermissibly create exigent circumstances by revealing their presence in order to alert suspects who would, in response, destroy evidence or put the police in danger. Whether the exigent circumstances are impermissibly manufactured is determined by "the reasonableness and propriety of the investigative tactics that generated the exigency." The "knock and talk" approach has been recognized as legitimate, and the officers did not manufacture an exigency by employing this legitimate investigative tactic.

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U.S. v. Maldonado, 472 F.3d 388, December 12, 2006

Click [HERE](#) for the court's opinion.

There is no general “security check” exception to the warrant requirement. However, depending on the circumstances, a “protective sweep” may be conducted to protect the safety of police officers or others. There must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. The protective sweep doctrine may apply even if the arrest occurs outside the home and even when the agents have no certain knowledge that other individuals are in the home. However, lack of information alone cannot provide an articulable basis upon which to justify a protective sweep.

Fear for officer safety may be reasonable during drug arrests, even in the absence of any particularized knowledge of the presence of weapons. In drug dealing it is not uncommon for traffickers to carry weapons.

To determine reasonableness, look to the totality of the circumstances and for both direct and circumstantial evidence. The brief time available to conduct surveillance, the exposure of the agents in the open area, the opening and closing of the door during the arrest, and the reasonable expectation that weapons are present during drug transactions are sufficient circumstantial evidence to support a finding that the agents' fear was reasonable.

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U.S. v. Penaloza-Duarte, 2006 U.S. App. LEXIS 31299 , December 20, 2006

Click [HERE](#) for the court's opinion.

To convict for possession of methamphetamine with intent to distribute, the prosecution must prove that the defendant (1) knowingly (2) possessed methamphetamine (3) with the intent to distribute it.

To prove that a defendant “aided and abetted,” the prosecution must also prove that the defendant associated with the criminal venture, purposefully participated in the criminal activity, and sought by his actions to make the venture succeed. “Association” means that the defendant shared in the principal's criminal intent (in this case, specific intent to distribute). “Participation” means that the defendant engaged in some affirmative conduct designed to aid the venture or to assist the perpetrator of the crime. Thus, a defendant must share in the intent to commit the offense as well as play an active role in its commission. It is not enough to show that the defendant engaged in otherwise innocent activities that just happened to further the criminal enterprise.

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6th CIRCUIT

Armstrong v. City of Melvindale, 432 F.3d 695, January 6, 2006

Click [HERE](#) for the court's opinion.

The Fourth Amendment requires probable cause to believe that *fruits, instrumentalities, or evidence of a crime* will be found at the place to be searched. Search warrants for items that lack any criminal link are unconstitutional.

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U.S. v. Dillard, 438 F.3d 675, February 27, 2006

Click [HERE](#) for the court's opinion.

Tenants of apartments and duplexes have a reasonable expectation of privacy in *locked* common areas. Because a duplex is more akin to a single-family home than a large apartment building, tenants may also have a reasonable expectation of privacy in unlocked areas such as a basement.

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U.S. v. Pruitt, 458 F.3d 477, August 11, 2006

Click [HERE](#) for the court's opinion.

An arrest warrant is sufficient to enter a residence if the officers, by looking at common sense factors and evaluating the totality of the circumstances, establish a “reasonable belief” that the subject of the arrest warrant is within the residence at that time. The “reasonable belief” standard is less than probable cause.

The 9th Circuit disagrees (cites omitted).

See *U.S. v. Barrera*, 5th Circuit (above).

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U.S. v. Carter, 465 F.3d 658, October 17, 2006

Click [HERE](#) for the court's opinion.

It is not necessary to allege nor prove the existence of a “trigger mechanism” to meet the definition of “machine gun” in 26 U.S.C. § 5845(b). Section 5845(b) defines “machine gun” as

...any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and

intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The statute includes a total of four definitions of a “machinegun,” i.e., the initial definition in the first sentence followed in the second sentence by three independent, alternative definitions added by amendment to the statute in 1968.

The 3rd, 4th, 7th, and Federal Circuits agree. (cites omitted).

The 10th Circuit disagrees. (cite omitted).

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7th CIRCUIT

U.S. v. Miller, 450 F.3d 270, June 7, 2006

Click [HERE](#) for the court’s opinion.

A factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates is not coercion. An objectively unwarranted threat to arrest or hold a suspect’s paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that amounts to coercion.

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U.S. v. Goodwin, 449 F.3d 766, May 24, 2006

Click [HERE](#) for the court’s opinion.

Fitting a drug courier profile based on a last minute cash purchase of a train ticket, combined with a response to questioning that appears to be a fabrication, amounts to reasonable suspicion.

More than reasonable suspicion may be required when the stop is more oppressive than a typical *Terry* stop.

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Shell v. U.S., 448 F.3d 951, May 23, 2006

Click [HERE](#) for the court’s opinion.

It is permissible to plant a listening device on an unwitting person pursuant to a Title III intercept order without that person’s consent.

U.S. v. Rosby, 454 F.3d 670, July 19, 2006

Click [HERE](#) for the court's opinion.

“Materiality” is an element of the mail-fraud offense under 18 U.S.C. § 1341. *Neder v. U.S.*, 527 U.S. 1 (1999). Reliance is not an element nor is it an aspect of the “materiality” element in mail-fraud prosecutions.

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U.S. v. McDonald, 453 F.3d 958, July 17, 2006

Click [HERE](#) for the court's opinion.

Looking at this issue for the first time, the Court decides:

An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law. Unlike a mistake of fact, a mistake of law, no matter how reasonable or understandable, cannot provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The good faith exception will also not apply.

The 5th, 9th, 10th, and 11th Circuits agree (cites omitted).

The 8th Circuit disagrees (See *U.S. v. Washington* below).

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U.S. v. Haddad, 462 F.3d 783, September 14, 2006

Click [HERE](#) for the court's opinion.

For the defense of entrapment, a defendant must present sufficient evidence upon which a rational jury could infer that the government induced the crime and that the defendant lacked predisposition to engage in the crime. Only then does the burden of defeating the entrapment defense shift to the government.

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U.S. v. Elder, 466 F.3d 1090, November 1, 2006

Click [HERE](#) for the court's opinion.

Many 911 calls are brief, and anonymous, precisely because the speaker is at risk and must conceal the call. These persons are more rather than less in need of assistance. The fact that drug dealers often use guns and knives to protect their operations creates a possibility that violence has been done, or that someone is still there and lying in wait. Therefore, following an anonymous call about methamphetamine,

entry into the outbuilding was reasonable, and a warrant was not necessary. The officers acted sensibly in attempting to assure the caller's safety.

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U.S. v. DiModica, 468 F.3d 495, November 16, 2006

U.S. v. Parker, 469 F.3d 1074, December 1, 2006

Click [HERE](#) for the court's *DiModica* opinion.

Click [HERE](#) for the court's *Parker* opinion.

Police are not required to ask for consent to search from all tenants who are present. Search pursuant to the valid consent of one tenant is reasonable when a co-tenant is present, but is not asked, and does not object. Police may not remove a co-tenant from the house for the sake of avoiding a possible objection to the subsequent search.

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U.S. v. De La Cruz, 469 F.3d 1064, November 29, 2006

Click [HERE](#) for the court's opinion.

When criminal intent is otherwise proven, after-the-fact ratification from those with authority is not a complete defense to prosecution for misapplication of public funds under 18 U.S.C. § 666(a)(1)(A).

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8th CIRCUIT

U.S. v. Morris, 436 F.3d 1045, January 31, 2006

Click [HERE](#) for the court's opinion.

Opening the locked screen door, although it gave access only to the small space between the screen door and the inner door, was a search for purposes of the Fourth Amendment.

To go ahead and enter, police must have reasonable suspicion that further compliance with the knock-and-announce requirement would inhibit the effective investigation of the crime.

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U.S. v. Richardson, 439 F.3d 421, March 2, 2006

Click [HERE](#) for the court's opinion.

The Court overrules its prior decisions and now holds that convictions for being a felon in possession,

and being a drug user in possession, based upon a single act of possession of a firearm, violate Double Jeopardy.

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U.S. v. Washington, 455 F.3d 824, August 1, 2006

Click [HERE](#) for the court's opinion.

To justify a traffic stop, police must objectively have a reasonable basis for believing that the driver has breached a traffic law. If an officer makes a stop based on a mistake of law, the mistake of law must be "objectively reasonable." The officer's subjective good faith belief about the content of the law is irrelevant. Officers have an obligation to understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.

See *U.S. v. McDonald*, 7th Circuit (above).

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U.S. v. Hudspeth, 459 F.3d 922, August 25, 2006

Click [HERE](#) for the court's opinion.

The consent of one who possesses common authority over the premises or effects is valid against the absent person who does not expressly refuse consent. The consent of one does not overcome the express refusal by another who is physically present. The consent of one also does not overcome the express refusal by another who is not physically present. When one co-occupant expressly denies consent to search, police must get a warrant.

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U.S. v. Francis, 462 F.3d 810, September 8, 2006

Click [HERE](#) for the court's opinion.

Constructive possession of a firearm by an employee of a business that deals in firearms may be established by knowledge of the location of the weapons, close physical proximity, and unfettered access. Infrequent handling of the weapons is immaterial. Increased evidence of knowledge and control is necessary for a finding of constructive possession in an employee / employer context.

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U.S. v. Martinez, 462 F.3d 903, September 11, 2006

Click [HERE](#) for the court's opinion.

A crime victim's identification of the defendant is admissible unless it is based upon a pretrial confrontation between the witness and the suspect that is both impermissibly suggestive *and* unreliable. An identification is unreliable if its circumstances create a very substantial likelihood of irreparable misidentification. Police need not limit themselves to station house line-ups when an opportunity for a quick, on-the-scene identification arises. Such identifications are essential to free innocent suspects and to inform the police if further investigation is necessary. Absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process.

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U.S. v. Zacher, 465 F.3d 336, October 11, 2006

Click [HERE](#) for the court's opinion.

A seizure of a package sent through FedEx occurs only when law enforcement "meaningfully interferes" with an individual's possessory interests in the property. A meaningful interference occurs only if the detention delays the timely delivery of the package.

No change of custody occurs just because the carrier gives the package to police at the carrier's place of business. The sender's reasonable expectations of how the carrier will handle the package define the scope of the carrier's custody. A reasonable person could expect FedEx to handle his or her package the same way.

(See *U.S. v. VaLerie*, 424 F.3d 694 (2005) [VaLerie at QR-7-2](#))

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U.S. v. Jones, 471 F.3d 868, December 20, 2006

Click [HERE](#) for the court's opinion.

During the execution of a premises search warrant, officers may conduct a protective sweep of a vehicle not on the curtilage but parked on an adjacent public street if articulable facts support a reasonable belief that it harbors someone who may pose a danger to them.

Federal Rule of Criminal Procedure 41 (and 18 U.S.C. § 3109) applies when a warrant is sought by a federal law enforcement officer or when the search is "federal in character." Searches may be "federal in character" if there is significant federal involvement in the search. Federal involvement is determined by considering factors such as the existence of an extensive joint state-federal investigation involving the defendant, a joint state-federal application for or execution of the search warrant, and whether federal agents used state officers and more flexible state procedures as a means of avoiding the strictures of Rule 41. Federal Special Agents, as well as Deputy U.S. Marshals, permanently detailed to the Career

Criminal Unit of the Kansas City, Missouri Police Department (“KCPD”), acting at all times under the command and supervision of the KCPD, were participating as “state officers” in the execution of a state search warrant. There was no expectation of federal prosecution. Therefore, Rule 41, requiring application for a search warrant to a Federal Magistrate Judge, did not apply.

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U.S. v. Davis, 471 F.3d 938, December 28, 2006

Click [HERE](#) for the court’s opinion.

Protective sweeps are not allowed in all cases, regardless of departmental policies to conduct a sweep of a house during *every* home arrest as a matter of course. Each protective sweep must be justified by articulable facts on an individualized basis.

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9th CIRCUIT

U.S. v. Gourde, 440 F.3d 1065 (en banc), March 9, 2006

Click [HERE](#) for the court’s opinion.

Paid membership in a child pornography download site can establish probable cause that there are child pornography images, or evidence of the same, on the suspect’s computer.

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U.S. v. Lopez-Perera, 438 F.3d 932, February 21, 2006

Click [HERE](#) for the court’s opinion.

An illegal alien who presents himself at a port of entry, and is found in possession of a firearm before he leaves the port, cannot be convicted of being an illegal alien in the United States in possession of a firearm.

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U.S. v. Rios, 449 F.3d 1009, June 2, 2006

Click [HERE](#) for the court’s opinion.

To convict someone of possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(a)), the government must prove something more than that the drug dealer happened to have a gun in his house. Neither a weapon’s fitness for crime, nor expert testimony that drug dealers habitually

possess weapons to protect their assets and intimidate competitors, is sufficient to establish possession in furtherance of drug trafficking.

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U.S. v. Thomas, 447 F.3d 1191, May 18, 2006

Click [HERE](#) for the court's opinion.

The driver of a rental car, who is not listed on the rental agreement but who has the permission of the authorized renter to drive the car, has standing to challenge a search of the vehicle.

The 8th Circuit agrees (cites omitted).

The 4th, 5th, and 10th Circuits hold that a driver not listed on the rental agreement lacks standing to object to a search regardless of consent from an authorized driver (cites omitted).

The 6th Circuit, noting a broad presumption against granting unauthorized drivers standing to challenge a search, determines whether the defendant had REP based upon all the surrounding circumstances. The court lists five factors (cite omitted).

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U.S. v. Ziegler, 456 F.3d 1138, August 8, 2006

Click [HERE](#) for the court's opinion.

Social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose significant dangers in terms of diminished productivity and even employer liability. Thus, in the ordinary case, a workplace computer simply does not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

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U.S. v. Cortez-Rivera, 454 F.3d 1038, July 24, 2006

Click [HERE](#) for the court's opinion.

Where a defendant moves to suppress evidence found during a border search and alleges that the search caused damage to his vehicle, the burden is on the defendant to prove by a preponderance of the evidence the existence of this damage, and that it affected the safety or operability of the vehicle. Then the burden shifts to the government to demonstrate that it had reasonable suspicion to conduct the search.

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U.S. v. Johnson, 459 F.3d 990, August 29, 2006

Click [HERE](#) for the court's opinion.

Looking at this issue for the first time, the Court decides:

There is no “innocent possession” defense that would excuse a defendant for being a felon in possession of a firearm if he had obtained it innocently and his possession was transitory.

The 1st, 4th, 6th, 7th, and 11th Circuits agree (cites omitted).

The D.C. Circuit disagrees (cite omitted).

* * * *

U.S. v. Arellano-Ochoa, 461 F.3d 1142, August 31, 2006

Click [HERE](#) for the court's opinion.

Opening a screen door to knock when the inner door is closed is not a Fourth Amendment intrusion. When the inner door is closed, people understand that visitors will need to open the screen door, and have no expectation to the contrary.

Opening a closed screen door when the inner door is open is a Fourth Amendment intrusion. Where the solid door is open so that the screen door is all that protects the privacy of the residents, opening the screen door infringes upon a reasonable and legitimate expectation of privacy.

Asking a person their name and place of birth are questions “attendant to arrest and custody” and do not require *Miranda* warnings.

* * * *

U.S. v. Washington, 462 F.3d 1124, September 6, 2006

Click [HERE](#) for the court's opinion.

Questions about an arrested defendant's name, date of birth, address, and medical condition are routine booking questions even if the identification may help the prosecution of that person for a crime. The identification of oneself is not self-incriminating.

Questions about an arrested defendant's gang affiliation and gang moniker are routine booking questions where officers routinely obtain such information for other officers to ensure prisoner safety.

Agreeing to listen without an attorney present after receiving *Miranda* warnings allows agents to describe the evidence against the person. Moreover, even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case.

U.S. v. Mendez, 467 F.3d 1162, October 30, 2006

Click [HERE](#) for the court's opinion.

Past gang membership and a felony conviction do not give rise to the requisite type of particularized, reasonable suspicion necessary to expand questioning beyond the scope of the traffic stop.

* * * *

U.S. v. Luong, 2006 U.S. App. LEXIS 31952, December 26, 2006

Click [HERE](#) for the court's opinion.

Under 18 U.S.C. § 2518(3), a federal district judge, upon proper showing, may authorize “interception of . . . electronic communications within the territorial jurisdiction of the court in which the judge is sitting.” The court in one district may authorize interception of communications to and from a mobile phone when that phone and its area code are located outside of the issuing court's district but the government's listening post is located within it. The intercepted communications are first heard by the government within the issuing court's district. An “interception” occurs where the tapped phone is located *and* where law enforcement officers first overhear the call.

The 2nd, 5th, and 7th Circuits agree. (cites omitted).

* * * *

U.S. v. Nobriga, 2006 U.S. App. LEXIS 32040 , December 29, 2006

Click [HERE](#) for the court's opinion.

18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by one previously convicted of a “misdemeanor crime of domestic violence,” does not require that the misdemeanor statute charge a domestic relationship as an element. Section 922(g)(9) requires only that the misdemeanor have been committed against a person who is in one of the domestic relationships specified under 18 U.S.C. § 921(a)(33)(A)(ii).

All seven circuits that have addressed this issue, the 1st, 2nd, 5th, 8th, 11th, D.C, and Federal Circuits, agree. (cites omitted).

The phrase “physical force” in the definition at 18 U.S.C. § 921(a)(33)(A)(ii) means the intentional *violent use of force against the body of another individual*. Crimes that involve the reckless use of force cannot be considered “crimes of violence.”

All three circuits that have addressed this issue, the 1st, 10th, and 11th Circuits, agree. (cites omitted).

* * * *

10th CIRCUIT

U.S. v. Al-Rekabi, 454 F.3d 1113, July 18, 2006

Click [HERE](#) for the court's opinion.

The bedrock of constructive possession - whether individual or joint, whether direct or through another person - is the *ability to control* the object. It has nothing to do with a *right to control*.

There is a “necessity defense” to firearms possession offenses. The necessity defense may excuse an otherwise unlawful act if the defendant shows that (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm.

(Editor's note – This is distinguished from the “innocent possession” defense. See *U.S. v. Johnson*, 9th Circuit above.)

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U.S. v. Pettigrew, 468 F.3d 626, October 13, 2006

Click [HERE](#) for the court's opinion.

The admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of *Miranda*, turns on whether the inculpatory statement was knowingly and voluntarily made. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. In the absence of coercion or improper tactics, a broader rule would “undercut the twin rationales of *Miranda*'s exclusionary rule - trustworthiness and deterrence.”

The 7th and 9th Circuits agree. (cites omitted).

18 U.S.C.S. § 113(a)(4), Assault by Wounding, is a general intent crime. Driving while voluntarily intoxicated supports an inference that the defendant intended the consequences of his actions.

* * * *

U.S. v. Cruz-Mendez, 467 F.3d 1260, November 6, 2006

Click [HERE](#) for the court's opinion.

It is important to distinguish “plain view” to justify the seizure of an object, from an officer's mere observation of an item left in plain view (sometimes called “open view”) which generally involves no

Fourth Amendment search. For a mere observation to be valid, the only requirement is that the officer be lawfully in a position from which he can view the object. (Parenthesis added).

* * * *

U.S. v. Torres-Castro, 470 F.3d 992, December 12, 2006

Click [HERE](#) for the court's opinion.

“Protective sweeps” are only permitted incident to an arrest. (The court has twice refused to authorize protective sweeps absent arrest (cites omitted)).

The 8th Circuit and one panel of the 9th Circuit agree. (cites omitted).

A majority of circuits have extended the protective sweep doctrine to cases where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest. See, e.g., 1st, 2nd, 5th Circuits, and another panel of the 9th Circuit. (cites omitted).

Protective sweeps, wherever they occur, may precede an arrest, and still be “incident to that arrest,” so long as the arrest follows quickly thereafter. The time at which an officer forms the intent to arrest is not determinative. To be “incident to an arrest,” there must have been a legitimate basis for the arrest that existed before the sweep. The legitimate basis for an arrest is purely an objective standard and can be for any crime, not merely that for which the defendant is ultimately charged after the protective sweep.

* * * *

11th CIRCUIT

U.S. v. Taylor, 458 F.3d 1201, July 28, 2006

Click [HERE](#) for the court's opinion.

The “Knock and Talk” exception to the Fourth Amendment’s probable cause and warrant requirement allows entry upon private land to knock on a citizen’s door for legitimate police purposes unconnected with a search of the premises. Absent express orders from the person in possession, an officer may walk up the steps and knock on the front door of any man’s castle, with the honest intent of asking questions of the occupant just as any private citizen may. Also, an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.

* * * *

U.S. v. Stallings, 463 F.3d 1218, September 7, 2006

Click [HERE](#) for the court's opinion.

The Federal Sentencing Guidelines provide that, if a dangerous weapon (including a firearm) was

possessed during a drug-trafficking offense, then a defendant's offense level should be increased by two levels, unless it is clearly improbable that the weapon was connected to the offense. The government must show that the firearm had some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. Although experience has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade, the mere fact that a drug offender possesses a firearm does not necessarily give rise to the firearms enhancement. The government must show some nexus beyond mere possession between the firearms and the drug crime.

* * * *

U.S. v. Evans, 2006 U.S. App. LEXIS 31744, December 26, 2006

Click [HERE](#) for the court's opinion.

Under 18 U.S.C. § 1343A, wire fraud, an unsolicited fax from the victim to the defendant is "for the purpose of executing" the scheme if it is "incident to an essential part of the scheme." Transmissions after a scheme has "reached fruition" cannot have been "for the purpose of executing" the scheme. A scheme has "reached fruition" when it is "fully consummated." Transmissions after the money is obtained may nevertheless be "for the purpose of executing" the fraud if designed to conceal a fraud, by lulling a victim into inaction. As such, they constitute a continuation of the original scheme to defraud. The success of the lulling effort is immaterial.

A transmission from the victim who recognizes the likelihood of fraud and threatens to sound the alarm if not swiftly satisfied, may not be in furtherance of the scheme if its "only likely effect would be to further detection of the fraud."

* * * *

D.C. CIRCUIT

U.S. v. Powell, 451 F.3d 862, June 23, 2006

Click [HERE](#) for the court's opinion.

A search of the passenger compartment of a car incident to a lawful arrest must occur *after* the arrest has taken place and not before.

* * * *

U.S. v. Lawrence, 471 F.3d 135, December 1, 2006

Click [HERE](#) for the court's opinion.

Constructive possession requires the ability to exercise knowing dominion and control over the items. It is reasonable to infer that a person exercises constructive possession over items found in his home. The

defendant's possession of a key to a residence he does not own or rent supports a reasonable inference that he was not just a casual visitor.